United Nations ECE/MP.PP/2017/47

Economic and Social Council

Distr.: General
15 August 2017

Original: English

Economic Commission for Europe

Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

Sixth session
Budva, Montenegro, 11–13 September 2017
Item 8 (a) of the provisional agenda
Accession to the Convention by States from outside the United Nations Economic Commission for Europe region

Preliminary assessment of the institutional, policy and legal framework of Guinea-Bissau*

Note by the secretariat**

Summary

The present report was prepared pursuant to decision IV/5, paragraph 4 adopted by the Meeting of the Parties at its fourth session (Chisinau, 29 June – 1 July 2011).[1] The report was prepared following the expression of Guinea-Bissau's formal interest to accede to the Aarhus Convention. The Convention's Working Group of the Parties at its twentieth meeting (Geneva, 15–17 June 2016) welcomed the interest of Guinea-Bissau in acceding to the Aarhus Convention and invited the Government to consider the steps required to proceed with accession in accordance with decision IV/5. This preliminary assessment of the institutional, policy and legal framework of Guinea-Bissau with reference to the three pillars of the Aarhus Convention identifies the activities already undertaken or planned to be undertaken by the country relating to the accession to the Convention and to the implementation of its provisions, including through the adoption of new legislation or the amendment of the existing one.

* This document was submitted late owing to additional time required for the secretariat and the consultant to finalize this report. The present document is being issued without formal editing.

** This report was prepared by a consultant commissioned by the Convention secretariat.

[1] See ECE/MP.PP/2011/2/Add.1

GE.17-13966(E)

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Introduction

1. Article 19, paragraph 3, of the Convention provides the possibility for States that are not members of the Economic Commission for Europe (ECE) to become Parties to the Convention, upon approval by the Meeting of the Parties. Through the adoption of decision IV/5 (Chisinau, 29 June – 1 July 2011), the Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) established a procedure to guide the accession of the States from outside the ECE region.[2]

2. In accordance with paragraph 4(c) of decision IV/5, upon completion of the internal decision-making process, the State concerned, through the ministry responsible for foreign affairs, shall submit its formal written expression of intention to accede to the Convention to the Meeting of the Parties, through the Executive Secretary of the ECE, at least eight months in advance of the next session of the Meeting of the Parties. This written expression should be accompanied by a description of activities already undertaken or planned to be undertaken by the State concerned relating to the accession to the Convention and to the implementation of its provisions. In addition, paragraph 2 of the decision states that the minimum legal and other appropriate measures required to implement the Convention should be in place, so as to ensure that the State concerned is in a position to comply with its obligations at the time of the entry into force of the Convention for that State. Finally, paragraph 4(d) of the decision foresees that the secretariat shall prepare a note reflecting the information provided by the State concerned for consideration by the Working Group of the Parties.

3. The formal interest of Guinea-Bissau to accede to the Convention was reported by the secretariat to the Working Group of the Parties at its twentieth meeting (Geneva, 15–17 June 2016). Taking note of the information received, the Working Group welcomed the interest of Guinea-Bissau in acceding to the Aarhus Convention and invited the Government of Guinea-Bissau to consider the steps required to proceed with accession in accordance with decision IV/5 of the Meeting of the Parties. In order to be considered as a candidate for accession at the sixth session of the Meeting of the Parties (Budva, Montenegro, 11–13 September 2017) the documents referred to in paragraph 2 above had to be submitted by Guinea-Bissau before 11 January 2017. The Working Group further discussed this matter at its twenty-first meeting (Geneva, 4–6 April 2017). The secretariat informed the meeting about recent developments regarding the formal request of Guinea-Bissau to accede to the Convention. At the time of the meeting, the Government was reviewing its national legislation and developing a road map for its accession. However, Guinea-Bissau would not be ready to prepare the required documents, namely the formal written expression of intention to accede to the Convention and the accompanying documents (see paragraph 2 above), and submit its request for accession to the Convention to the Meeting of the Parties at its upcoming session in accordance with the deadline set through decision IV/5. A delegate of Guinea-Bissau was also present at those meetings and provided additional information on the progress achieved.

4. The present report's objective is to provide the Meeting of the Parties at its sixth session with information on a preliminary assessment of the institutional, policy and legal framework of Guinea-Bissau with reference to the three pillars of the Aarhus Convention, identifying the activities already undertaken or planned to be undertaken by the country relating to the accession to the Convention and to the implementation of its provisions, including the adoption of new legislation or the amendment of the existing one. It is

[2] See ECE/MP.PP/2011/2/Add.1

expected that the current report and any relevant updates would accompany a formal written expression of intention to accede to the Convention to be submitted by Guinea-Bissau in accordance with paragraph 4(c) of decision IV/5 for consideration by the Meeting of the Parties at its next session.

I. Institutional, Policy and Legal Framework

5. At the policy level there are various policies, programs and plans related to the environment and natural resources in place in Guinea-Bissau. In that regard, the National Environmental and Sustainable Development Policy (*Política Nacional de Ambiente e Desenvolvimento Sustentável*) should be highlighted. It is presently being drafted by the Ministry of Environment and Sustainable Development (*Ministério do Ambiente e Desenvolvimento Sustentável*) with the support of the United National Development Programme (UNDP). The National Environmental and Sustainable Development Policy foresees as one of its priorities, the implementation of the Aarhus Convention.[3]

6. At the institutional level, the Office of Information, Documentation and Environmental Education within the Ministry of Environment and Sustainable Development is in charge of implementing and coordinating the system of environmental information. The organic structure of the Ministry is presently under review and is expected that this office will be converted into a General Secretariat in charge of promoting access to information and public participation in environmental matters.

7. Other relevant institutions are the Access to Justice Centres established in 2011 under the Ministry of Justice with the aim of facilitating access to justice in the country.[4]

8. The sections below present a brief assessment of the main relevant legislation in force in Guinea-Bissau on access to information, public participation in decision-making and access to justice in environmental matters.

II. Access to information

9. The Constitution of the Republic of Guinea-Bissau (*Constituição da República da Guiné-Bissau*), of December 1996, establishes in article 34 the following fundamental right: "Everyone has the right to information and legal protection, in accordance with the law".

10. The Constitution further establishes, under its article 51, paragraph 1 that: "Everyone has the right to freely express and disseminate his or her thinking through any means at his or her disposal, as well as the right to inform, to be informed and to be informed without impediment or discrimination".

11. In line with article 4 of the Convention, the Environmental Framework Law, approved by Law n.° 1/2001 of 2 March (*Lei de Bases do Ambiente*), under its chapter V on the rights and duties of persons, expressly foresees the right of access to environmental information (article 40): "Everyone has the right of access to information relating to the management of the country's environment, without prejudice to the rights of third parties legally protected".

[3] The consultant had access to the version under consultation from 14 May 2017.

[4] These Centres were established by Order n.° 13-A/2011, of 13 June and are presently based in Bissau, Cacheu, Oio and Buba.

12. The Environmental Framework Law further defines Environmental Information, Education and Communication as one of the instruments of the Environmental Policy and Management (article 28 (i)).

13. Along the same lines, the Environmental Evaluation Law, approved by Law n.° 10/2010 of 24 September (*Lei de Avaliação Ambiental*) establishes, under article 40, paragraph 1, the overall principle that: "the environmental evaluation procedures are public, meaning all its elements and documents are available for public consultation".

14. The Land Law, approved by Law n.° 5/98 of 28 April, establishes access to information as a fundamental principle for the management of the land stating under its article 5, paragraph 1(e) that "the soil protection policy must be accompanied by a process of information and participation of the citizens". This provision is also relevant to public participation in decision-making as set out below.

15. The Land Law further establishes, under article 42(e), the Government's responsibility to: "ensure the citizens' rights of information on the progress and the interim and final decisions taken in the cases in which they are directly concerned".

16. No specific provisions were found with regard to collection and dissemination of information pursuant to article 5 of the Convention.

III. Public participation in decision-making

17. In line with article 7 of the Convention, the Environmental Framework Law establishes public participation as one of its principles and defines it, under its article 5(g), as follows: "Natural and legal persons shall intervene in the formulation and implementation of environmental and sustainable development policies. The State shall promote and ensure the participation of all social partners in the decision-making process".

18. In order to ensure the participation of local communities, Environmental Framework Law further requires, under its article 38, that the body in charge of environment shall promote the effective involvement of local communities in policy-making and management of natural resources.

19. The participation of non-governmental organisations (NGOs)[5] is specifically foreseen under article 39 of the Environmental Framework Law, which established their right to participate and to be represented in environmental management forums.

20. In line with article 6 of the Convention, the Environmental Evaluation Law establishes public participation as one of its principles, which is defined in article 4(d) as follows: "Public Participation: information, conciliations and consultation of the population on a given environmental problem, i.e. the population's involvement since the beginning about the development activity that may cause problems in the environment and human health".

21. In line with the same provision of the Convention, the Environmental Evaluation Law enumerates, under its article 41 entitled "right of consultation", the following documents as being subject to public access:

(a) Environmental impact study report;

[5] Defined by the Environmental Framework Law (article 39) as those organisations "duly legalized, whose programmatic content and social object is to defend the environment, the rational use of natural resources and the protection of the rights of quality of life".

(b) Non-technical summary;

(c) Public consultation report and its annexes;

(d) Final report of the Ad Hoc Committee;

(e) Opinions of the administrative authorities;

(f) Declarations of Environmental Compliance;

(g) Certificate of Environmental Compliance;

(h) Final Decision and the exemption from the Environmental Evaluation procedure.

22. With regard to those documents, under its article 42, the Environmental Evaluation Law grants interested parties[6] the right of access to such information and subjects the competent authority to the responsibility of creating the conditions for such access. The expenses are to be supported by the project developer.

23. The same Law specifically requires public participation in all the project phases (article 14, paragraph 1). Public participation shall be granted at all stages of the project (preparatory implementation, exploration and deactivation). This is also fundamental during the preparatory phase, the subsequent undertaking of the study, and up to its approval.

24. Under the same provision the project developer[7] is required, in consultation with the Environmental Evaluation Authority[8], to take all necessary measures to request and obtain the views of the populations that may be affected by the project and any other actors at local, regional, national or even international level.

25. Annex I and II of the Environmental Evaluation Law specify the activities or projects subject to environmental evaluation and Annex III the sectors of the plans and policies subject to such evaluation.

26. It should also be mentioned that a Regulation on Public Participation, which aims at regulating the Environmental Evaluation Law with regard to the procedures, measures or forms and conditions of public participation has been drafted with the support of UNDP and was approved by the Council of Ministers on 6 of April 2017 together with the following set of regulations linked to the Environmental Framework Law and the Environmental Evaluation Law: Environmental Impact Assessment; Environmental Fund; Environmental License; Environmental Audit; and Environmental Inspections. These regulations have however not yet been published.

27. In line with article 6 of the Convention, the participation of local communities is also required under other laws, such as the Framework Law of Protected Areas, approved by Law Decree n.º 5-A/2011 of 1 March, which in its preamble expressly refers to the "participative process of the adoption of the Law" itself and the engagement of the Government in the review of the legal framework of protected areas which constitutes "an

[6] Defined by the Environmental Evaluation Law (article 5, paragraph 17) as "persons enjoying their civil and political rights, with principal or secondary residence in the area bordering the location of the project, as well as their representative organizations, environmental NGOs and any other entities whose duties or statutes justify it.

[7] Defined by the Environmental Evaluation Law (article 5, paragraph 30) as " individual or legal person, public or private, applying for authorization or licensing of a project".

[8] Defined by the Environmental Evaluation Law (article 5, paragraph 6) as "the Government's Department responsible for the definition of the environmental policy and coordination and supervision of the actions in the environment of Guinea-Bissau at national and international level in charge of supervising the management of the environmental assessment process".

effective way of conserving its terrestrial and marine biodiversity, thus safeguarding the interests of the local population, which is therefore involved in the management and conservation of ecosystems through the participative process".

28. The Framework Law of Protected Areas further establishes under its article 7, paragraph 1, that "the proposal for the creation of a protected area shall be formulated with the involvement of the resident communities". For the declassification of a protected area the same law requires that the process contains the following two documents (article 10): a statement of reasons by the communities concerned and the competent authorities providing justification on the chosen option and the impossibility of continuing the activities in progress; a disqualification study report on the ecosystems and communities that are in the protected area concerned.

29. The Board of Directors of the protected areas comprises, inter alia, representatives from local communities, NGOs and local enterprises (article 16, paragraph 1(b) and (e)).

30. In line with article 7 of the Convention, article 5 of the Land Law requires a process of public participation with regard to the policy of soil protection specifying the participation of the local communities in the integrated soils management together with the Government, the municipalities, the Land Commission and the Registration Services of the Maritime and Port Authorities.

31. In line with article 8 of the Convention, the Land Law further establishes under its article 44 the rights of local communities with regard to the decision making process, namely concerning the organisation and coordination of the public consultation processes and managing and distribution of customary land to resident populations.

32. The Code of Mining and Quarrying, approved by Law n.° 3/2014 of 29 April, subjects the activities of mining and quarrying to an Environmental Impact Assessment regarding which the previously indicated rules of the Environmental Evaluation Law apply mutatis mutandis.

IV. Access to justice

33. Article 32 of the Constitution of Guinea-Bissau establishes the following fundamental principle on access to justice: "Every citizen has the right of court appeal against acts that violate their rights recognized by the Constitution and the law, and justice cannot be denied due to insufficient economic means". This provision refers to "citizen" without any distinction between nationals or foreigners.

34. The Environmental Framework Law strengthens the pillar of access to justice under its article 42, establishing that "any person who considers that his/her rights granted by this law have been violated or are in the process of being violated, may appeal to the courts to request in general terms the termination of the causes of such violation and the respective compensation".

35. It is understood that, in line with article 9, paragraph 1 of the Convention, this provision grants any person the right to challenge denial of access to information in the courts, which is one of the rights granted by the Environmental Framework Law. Its scope is however limited to "this Law" and does not expressly include the right to challenge acts or omissions of public authorities contravening environmental protection obligations under the Environmental Framework Law and other relevant legislation, as required under article 9, paragraph 3, of the Convention.

36. Furthermore, regarding article 9, paragraph 2 and 3, of the Convention, the Environmental Evaluation Law grants the injured parties the right to appeal to court and to

seek compensation when the activity undertaken by the project developer causes environmental damages and the remedial measures have not been undertaken by the developer or have not been sufficient to eliminate the damage (Environmental Evaluation Law, article 57).

V. Activities undertaken or planned by Guinea-Bissau to accede to the Convention

37. The National Popular Assembly of Guinea-Bissau (Parliament) has, back in 2005 approved the Aarhus Convention, by Resolution n.° 27/2005, of 30 May. The accession was then approved by Presidential Decree n.° 29/2010 of 3 May.

38. In July 2015 the Government of Guinea-Bissau nominated a national focal point,[9] to work with the Convention's secretariat on the accession process. In May 2016, the Ministry of Environment and Sustainable Development informed the secretariat of the Aarhus Convention about the nomination of the focal point and that the Ministry of Foreign Affairs had earlier that year deposited the instrument of ratification with the Secretary-General of the United Nations. In this context, the secretariat provided clarification to Guinea-Bissau regarding the requirements set out in article 19, paragraph 3 of the Aarhus Convention and decision IV/5 on the issue of accession by non-ECE States. The secretariat since then maintains regular communication with Guinea-Bissau and provides advisory in relation to the State's progress towards accession.

39. The national focal point has attended the meetings below in Geneva and provided information about the state of play of Guinea-Bissau with regard to the three pillars of the Convention:

(a) Ninth meeting of the Task Force on Access to Justice (Geneva, 14–15 June 2016).[10]

(b) Twentieth meeting of the Working Group of the Parties to the Aarhus Convention (Geneva, 15–17 June 2016).[11]

(c) Fifth meeting of the Task Force on Access to Information (Geneva, 10–11 October, 2016).[12]

(d) Tenth meeting of the Task Force on Access to Justice (Geneva, 27–28 February, 2017).[13]

(e) Twenty-first meeting of the Working Group of the Parties to the Aarhus Convention (Geneva, 4–6 April 2017).[14]

VI. Proposal on the required amendments to existing legislation

40. As demonstrated above, access to information and public participation are generally anchored in the Environmental Framework Law and Environmental Evaluation Law and in some other sectorial legislation, including Land and Mining. No specific provisions were

[9] Order 22/SEA/15, from 28 July 2015.
[10] www.unece.org/env/pp/aarhus/tfaj9.html
[11] http://www.unece.org/env/pp/aarhus/wgp20.html#/
[12] https://www.unece.org/env/pp/aarhus/tfai5.html#/
[13] http://www.unece.org/env/pp/aarhus/tfaj10.html
[14] http://www.unece.org/env/pp/aarhus/wgp21.html#/

however found with regard to collection and dissemination of information pursuant to article 5 of the Convention, nor with the challenging of acts or omissions of public authorities contravening environmental protection obligations, pursuant to article 9, paragraph 3 of the Convention. Article 9, paragraph 2, of the Convention is only partially covered by the Environmental Evaluation Law. To complete, improve and update the implementation of the Aarhus Convention, amendments should be made to these framework laws.

VII. Proposal on the required new legislation

41. It is recommended that the following legislation is adopted in order to strengthen the implementation of the Convention's obligations in Guinea-Bissau. While, some of the issues could be incorporated in the Environmental Framework Law and in the Environmental Evaluation Law, others should be established under specific regulations. The rationale of the proposed legal instruments is briefly presented below but their exact nature should be defined in the future. It is therefore proposed to establish the following:

(a) Legal instrument on access to environmental information, to further implement the provisions of the Convention on access to environmental information (article 4) and also cover the Convention's provisions on collection and dissemination of environmental information (article 5) which, as stated above, are not foreseen in the Environmental Framework Law.

(b) Legal instrument on right of procedural participation and people's action, to further implement the general rights granted under the Constitution of Guinea-Bissau, the Environmental Evaluation Law and the Environmental Framework Law (namely its article 42) with regard, inter alia, to the scope of the right, the definition of "sufficient right" and the procedures in line with article 9, paragraphs 2 and 3, of the Convention.

(c) Legal instrument on environmental NGOs, to further implement the right to participate and being represented in environmental management forums established under article 39 of the Environmental Framework Law.

(d) Legal instrument on environmental liability, to further develop the provisions of the Environmental Evaluation Law on environmental damages, remedial actions and liability in line with article 9, paragraph 4, of the Convention.

(e) Legal instrument on environmental infractions, to support implementation of article 9, paragraph 3, of the Convention with regard to grating the members of the public the right to having access to administrative procedures to challenge acts and omissions of public authorities contravening environmental protection obligations. This is also in line with article 52 of the Environmental Framework Law, which foresees the adoption of specific legislation on this regard.

(f) Legal instrument on environmental crime. This is in line with article 50 of the Environmental Framework Law which establishes that: "in addition to the crimes foreseen and punished in the Penal Code, the offenses that the complementary legislation qualifies as such in accordance with the provisions of this law shall be considered crimes".

VIII. Proposal on roadmap and timeline

42. With regard to the policy and institutional framework, it is expected that the National Environmental and Sustainable Development Policy will be approved this year (2017) together with the new organic law of the Ministry of Environment and Sustainable Development.

43. The timeline for adoption of the new proposed legislation identified under the previous subsection should occur within the next two years (2017–2019).

44. Guinea-Bissau has completed its internal decision-making process on accession to the Convention. The country will now be required to proceed with a formal written expression of intention to accede to the Convention to be submitted in accordance with paragraph 4(c) of decision IV/5.

45. Guinea-Bissau will participate as an observer at the sixth session of the Meeting of the Parties to the Convention. It is expected that at its sixth session, the Meeting of the Parties will consider the progress achieved by Guinea-Bissau in relation to the accession to the Convention with the view of considering the possible approval of accession at its next session subject to meeting the requirements set out in decision IV/5.